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August 16, 1991

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The Honorable Marjorie W. Emmons
Commission Secretary
Federal Election Commission
999 E. Street, N.W.
Washington, D.C. 20463

Re: MUR 2314 (National Republican Senatorial Committee and James L. Hagen, as Treasurer)

Dear Madam Secretary:

Enclosed please find Respondents' Brief and ten copies in the above-captioned matter filed pursuant to 11 C.F.R. § 111.16(c).

Sincerely,

Jan Witold Baran

Encl.
cc: Lawrence M. Noble, Esq. (3 copies)
Mr. James L. Hagen
Jay Velasquez, Esq.

BEFORE THE FEDERAL ELECTION COMMISSION

In The Matter Of	)	
	)	
NATIONAL REPUBLICAN SENATORIAL COMMITTEE and JAMES L. HAGEN, as Treasurer	)	MUR 2314
	)	
	)	

RESPONDENTS' BRIEF

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National Republican
Senatorial Committee and
James L. Hagen, as
Treasurer

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RESPONDENTS' BRIEF

On behalf of the National Republican Senatorial Committee ("the NRSC") and James L. Hagen, as Treasurer, the undersigned counsel submit this Respondents' Brief in response to the General Counsel's Brief of March 22, 1991 (hereinafter "Brief") recommending that the Federal Election Commission ("the FEC" or "the Commission") find probable cause to believe that the NRSC and its treasurer violated the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission Regulations. Respondents respectfully request that the Commission defer any action in this matter pending resolution of FEC v. NRSC, et al., No. 90-2055 (D.D.C. Apr. 9, 1991), appeal pending, No. 91-5171 (D.C. Cir. June 4, 1991) (hereinafter "FEC v. NRSC"). Alternatively, Respondents urge the Commission to reject General Counsel's recommendation, and to find in lieu thereof no probable cause to believe.

INTRODUCTION

At issue in Matter Under Review ("MUR") 2314 is (1) whether the NRSC violated 2 U.S.C. § 434(b) and 11 C.F.R. § 110.6(d)(2) due to the manner in which it reported

$210,152.87 in earmarked contributions to the Jim Santini for Senate Committee for which the NRSC served as a conduit pursuant to 11 C.F.R. § 110.6, and which were reported to the Commission in accordance with that provision and (2) whether the NRSC violated 2 U.S.C. § 434(b) and 11 C.F.R. § 106.1 in the manner in which it calculated and reported its solicitation costs for earmarked contributions by a per-contribution accounting method. The Brief asserts that the NRSC exercised "direction or control over the choice of the recipient candidate" by actively soliciting earmarked contributions for the Santini Committee, thus resulting in excessive contributions from the NRSC to the Santini Committee under 2 U.S.C. § 441a(h), and that the NRSC failed to calculate properly its solicitation costs which were billed to the Jim Santini for Senate Committee.

As explained more fully below, General Counsel's probable cause recommendation is not supportable on the record in this matter. The recommendation is based on a misconstruction and misapplication of the relevant regulations as well as on unsupported factual inferences. Moreover, all donations were fully disclosed.

As the Commission is aware, the NRSC has recently appealed the United States District Court's ruling in FEC v. NRSC. Resolution of the issues in that case may affect the outcome in MUR 2314. Although Respondents understand that

the Commission cannot defer this matter "indefinitely," we believe there is precedent and good reason for the deferral of a decision in this matter only until issues in that case are resolved on appeal. Therefore, the NRSC respectfully requests the Commission to defer any activity in MUR 2314 until the appellate process has defined the "direction or control" standard of 11 C.F.R. § 110.6(d) and/or determined whether that provision violates the United States Constitution. Should the Commission proceed, however, the NRSC respectfully requests that the Commission find no probable cause that NRSC violated the Act and Regulations and dismiss MUR 2314 for the reasons stated below.

SUMMARY OF ARGUMENT

In 1977 the Commission established, without reference to any express statutory language, and without any definition, a "direction or control" restriction on earmarked contributions. 11 C.F.R. § 110.6(d). The only basis identified for this new regulation was a brief passage in a House report which itself provided no definition for the terms "direction or control." Ever since this regulation's promulgation fourteen years ago, the Commission has avoided giving it any meaning. Indeed, in 1989 the Commission considered but expressly declined to adopt any standard of "direction or control."

circumstances" analysis -- in some, but not all, of the NRSC's activities at issue in this Matter. Without an understanding of the individual "circumstances," neither the NRSC nor any other group which may come before the Commission in the future can begin to piece together their "totality."

Further confusing the issue is a conflict between the circumstances in which the Commission has previously found that no "direction or control" exists and the circumstances suggested by General Counsel as evidence that "direction or control" does exist. The conflicting circumstances include:

(a) The clear suggestion of candidates in need of support (See Advisory Opinion 1980-46 where this was expressly allowed);

(b) The timing of solicitations (a factor present in every previous Commission opinion addressing the issue of solicitation of earmarked contributions); and

(c) The method of solicitation (never before suggested by the Commission to be an issue)

The General Counsel's argument, in its simplest form, implies that only candidates (and not other individuals or groups) may solicit contributions to campaigns, because everyone else will inevitably make decisions about who to solicit, and when, and for which candidate, and those decisions will then be evidence of "direction or control" by the solicitor. This erroneous position means that an individual who has made a deliberate choice to designate a specific dollar contribution to a specific candidate did not

really direct or control that contribution because someone else decided to ask for it.

Of course, the FEC repeatedly in opinions and enforcement actions has permitted solicitation of earmarked contributions without such solicitation constituting "direction or control." Therefore, one can only conclude that the General Counsel's Brief is asking the Commission to establish a new policy of outlawing everyone who successfully solicits earmarked donations. Thus far this proposed policy seems to affect only the NRSC.

The problem with this case, and this issue, is that no one knows what they are talking about when they speak of "direction or control." We submit that the reason the Commission, General Counsel, and Judge Gesell in his opinion in FEC v. NRSC find it impossible to define "direction or control" is that "direction or control" simply cannot exist where a contributor voluntarily earmarks a contribution. If a contribution is earmarked (which the General Counsel's Brief expressly concedes is the case in each of the programs at issue here) then the only relevant question left is whether the conduit followed the donor's instructions. The contributor's "control" is manifest and absolute by virtue of the fact that he or she decides whether to contribute to a candidate and "directs" the conduit as to which candidate should receive the donation. No one suggests that the NRSC

failed to follow the earmarking instructions of contributors. In short, where, as here, a contribution is voluntarily earmarked and the conduit follows those instructions, "direction or control" is necessarily precluded.

I. STATEMENT OF THE CASE

Procedural Summary

This matter arises from a complaint filed with the Commission by Richard Segerblom on January 13, 1987. Respondents filed a response to the complaint on March 10, 1987, asserting their position that no violation of the Act or Regulations had occurred. After a response by NRSC on March 10, 1987, the FEC on July 28, 1987 found reason to believe that the NRSC violated 2 U.S.C. §§ 441a(h), 434(b), and 11 C.F.R. § 110.6(d)(2), by failing to report in a certain way contributions forwarded to Jim Santini's campaign committee through a program known as "Direct-To." Respondents provided the Commission complete answers to its interrogatories and requests in September of 1987. After further investigation, on January 24, 1989, the Commission found reason to believe that the NRSC violated 2 U.S.C. § 434(b) and 11 C.F.R. § 106.1 by failing to report certain solicitation costs associated with the Direct-To program as contributions to the Santini Committee from the NRSC. On

May 22, 1989, Respondents replied to further interrogatories and requests issued by the Commission.

Finally, on March 25, 1991, over four years since the filing of a complaint in MUR 2314 and almost two years after the last development in this case, the FEC's General Counsel issued a brief recommending that the Commission find probable cause to believe that the NRSC violated 2 U.S.C. §§ 441(a)(h), 434(b) and 11 C.F.R. § 110.6(d)(2), with respect to some or all of the programs through which earmarked contributions were forwarded to the Santini Committee.[1/] In addition, General Counsel recommended that the Commission find probable cause to believe that the NRSC violated 2 U.S.C. § 434(b) and 11 C.F.R. § 106.1 for failing

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[1/] In particular, the General Counsel asked the Commission to find probable cause to believe that the NRSC exercised "direction or control" over the following aspects:

1. All monies forwarded to Santini through the "Direct-To" program;

2. All monies forwarded to Santini in that portion of the "Direct-To Auto" program that was not included in MUR 2282;

3. Those monies forwarded to Santini through the "Majority '86" program that were in the form of checks made payable to the NRSC;

4. Those monies forwarded to Santini through the "Trust Program" that were in the form of checks made payable to the NRSC; and

5. Those monies forwarded to Santini through the "Miscellaneous Conduiting" program that were in the form of checks made payable to the NRSC.

to report solicitation costs for certain programs as contributions from the NRSC to the Santini Committee.[2/]

On April 11, 1991, the NRSC requested by letter that the Commission stay any further proceedings in MUR 2314 until a final resolution could be obtained in FEC v. NRSC. The Commission denied the NRSC's request on May 14, 1991. Subsequently, the NRSC appealed the District Court's Order in FEC v. NRSC and again requested that the Commission await resolution of that case before proceeding in MUR 2314 given the common issues before the Court of Appeals and the Commission. In both letters, Respondents argued that postponement of further action was reasonable in MUR 2314 because the issues on appeal before the Court of Appeals (specifically "direction or control") might directly bear on the issues involved in MUR 2314. Therefore, Respondents asserted that its interests and the Commission's interests weighed in favor of deferring action until resolution of FEC v. NRSC. On July 16, 1991, the Commission again denied the

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[2/] General Counsel recommended probable cause to believe that the NRSC failed to allocate properly solicitation costs with respect to the "Direct-To," "Direct-To Auto," "Majority '86," and "Miscellaneous Conducting" programs. General Counsel specifically found that the NRSC failed to allocate solicitation costs of $12,716 in the "Direct-To" program, $42,404.76 in the "Direct-To Auto" program, $16,665 in the "Majority '86" program, and between $58,000-$74,000 in the "Miscellaneous Conduiting" program. The General Counsel did not recommend probable cause to believe that the NRSC violated FEC solicitation cost regulations with respect to the "Trust Program."

NRSC's request and ordered a responsive brief by August 17, 1991. This Respondents' Brief is filed pursuant to that directive.

Facts On The Record

The facts of this Matter are undisputed. The Friends of Jim Santini Exploratory Committee filed a statement of Organization on February 20, 1986. See Exhibit 8 of Respondents' March 10, 1987 Response to Complaint in MUR 2314 (hereinafter "Response to Complaint"). On March 24, 1986, Congressman Santini announced his candidacy for the Republican nomination for the United States Senate. See Complaint in MUR 2314 at 3. On March 25, 1986, and for every day through March 31, 1986, contributors contacted by the NRSC directed the NRSC to forward to the Santini campaign all or portions of specific checks they had written in response to NRSC fundraising appeals. These funds had not been received as contributions by the NRSC, but had instead been segregated into a special account pending instructions (if any) from the contributor to earmark it as a contribution to any specific candidate. If no such instructions were received within ten days, the funds were transferred to the NRSC's general account and became a contribution to the NRSC. See Affidavit of Maryanne E. Preztunik, Comptroller and Director of Administration of NRSC, Exhibit 1 of Response to

Complaint, at ¶ 6 (hereinafter "Preztunik Affidavit") and Exhibits 3 - 7 of Response to Complaint. During this same time period, the NRSC also initiated new solicitation efforts that resulted in contributions earmarked for numerous Senate campaigns including the Santini Committee.

Congressman Santini filed a Statement of Candidacy on April 4, 1986, and the Friends of Jim Santini filed an amended Statement of Organization on the same date (in which it dropped "Exploratory Committee" from its name). See Exhibits 9 and 10 of Response to Complaint. The Friends of Jim Santini then filed its first report, for the period ending March 31, 1986, with the FEC on April 15, 1986.[3/] See Exhibit 11 of Response to Complaint.

The Friends of Jim Santini's April 15, 1986 report, which is the subject of this MUR, listed at Schedule A contributions from individuals received through the NRSC during the period March 25, 1986 to March 31, 1986. Id. The NRSC, as the "conduit or intermediary," also reported the "original source and intended recipient of the contribution," to the FEC, the Secretary of the Senate, and to the intended

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[3/] The FEC records indicate that Congressman Santini designated the Jim Santini for Senate Committee as his principal campaign committee, and the Friends of Jim Santini as an affiliated committee when he filed his statement of candidacy. See Exhibit 9 of Response to Complaint.

recipient (the Friends of Jim Santini) in compliance with 11 C.F.R. § 110.6(c).[4/]

The NRSC conducted an "earmarking" or "conduit" program, which gave these individuals the opportunity to direct their contributions to the Santini campaign. These programs are described at length in the Preztunik Affidavit, in Respondents' September 22, 1987 Answers to Interrogatories, as well as below. As the Preztunik Affidavit sets forth, the NRSC made arrangements during the 1985-1986 election cycle to enable individuals to earmark their contributions to specific candidates through several programs involving letters, telephone contact, and personal communications. Many of these programs utilized subsequent confirmatory letters. These programs were known as the "Direct-To" program, the "Direct-To Auto" program, the "Majority '86" program, the "Trust Program," and other miscellaneous conduiting programs. Preztunik Affidavit at ¶ 3; see also September 22, 1987 Answers to Interrogatories by The NRSC and Exhibits Attached Thereto (hereinafter "Answers to Interrogatories"). The various programs are outlined below.

4/ See Exhibit 12 of Response to Complaint.

Direct-To Program

From November 1985 to November 1986, the Direct-To program reached individuals who had responded to NRSC-originated fundraising appeals and whose checks had been segregated in a special account upon receipt at NRSC. See Preztunik Affidavit at ¶ 4. The program commenced with telephone calls from NRSC phone banks to these persons. These calls made individuals aware that they could direct their contributions to named Senatorial candidates if they desired. Id. Individuals were told that several specific campaigns were in need of assistance, and asked whether they wished to direct all or a portion of their funds to any of those campaigns. Id. at ¶ 6. See also Script for Telephone Callers ("Script") at Exhibit 3 of Response to Complaint.

The NRSC always identified a minimum of three and often four candidates for contributors' consideration. In response to these calls, individuals contacted by telephone directed their contributions in a variety of ways: to be divided between all of the candidates mentioned, to be divided between only some of them, to be sent to only one of them, to be sent to candidates not mentioned by the NRSC caller, or to be sent to no candidate. Preztunik Affidavit at ¶ 6. The NRSC callers created and NRSC maintains computerized

contemporaneous records of each contributor's instructions. Id. at ¶ 7. Ms. Preztunik states that:

> If a contributor directed that a contribution be sent to a particular candidate or candidates, then the NRSC automatically forwarded the contribution to that campaign or campaigns without question. If the contributor . . . did not direct all or part of his or her contribution to any candidate, then the contribution or remaining portion was considered a contribution to the NRSC, placed in the NRSC operations account, and so reported.

Id. at ¶ 6.

In the case of those individuals who did direct the NRSC to forward all or part of their contribution to a specific candidate or candidates, the NRSC immediately sent a letter confirming the contributor's directions. Id. at ¶ 8. See also Sample Letter at Exhibit 5 to the March 10, 1987 Response of the NRSC. The purpose of this letter was both to provide the contributor with a written confirmation of the telephonic designation, and to provide the NRSC with an additional, separate, record of the contributor's instructions. Preztunik Affidavit at ¶ 8. Each letter was accompanied by a "Candidate Support Verification Form" which provided an additional record of the directed contributions for those individuals who took the time to sign and return the form to the NRSC. Id. at ¶¶ 8 & 9; see also sample of Candidate Support Verification Form at Exhibit 6 to the March 10, 1987 Response of the NRSC. At no time did any funds

placed in the Direct-To program's special account remain there for a period of time exceeding ten days. Preztunik Affidavit at ¶ 6.

NRSC telephone callers were under the constant supervision of either Ms. Preztunik personally, or an NRSC official responsible to her. Id. at ¶ 5. There was no reported instance in which an NRSC telephone caller directed or controlled a contribution and there is no evidence on the record of any instance in which an NRSC caller disregarded a individual's instructions. Id. As Ms. Preztunik explains in her Affidavit, "[t]he program was designed to give the contributors, and only the contributors, the opportunity to donate to the candidates of their choice." Id.

For those donors whom NRSC operators were either unable to contact or who did not designate a contribution to specific candidates, the NRSC transferred their funds out of the Direct-To account into a general operations account and reported it as a contribution made to the NRSC. Funds were not held in the Direct-To account for longer than 10 days. Preztunik Affidavit at ¶ 6. Of all the funds deposited into the Direct-To account, 53% went to designated candidates and 47% became contributions to the NRSC.

Direct-To Auto Program

In the Direct-To Auto program, the NRSC mailed solicitation letters from September 1986 to November 1986 suggesting that individuals earmark contributions to a suggested Republican Senatorial candidate. The letters stressed that Republican control of the Senate was at stake and identified by name Republican candidates who were in need of financial support. The NRSC's direct-mail letters suggested Senatorial candidates in need of help. The letters also suggested a range of contribution amounts to be earmarked. Each solicitation letter included at least two suggested contribution amounts.

Attached with the solicitation letter was a reply form to accompany any contribution sent to the NRSC. Contributors indicated on the reply card the amount they chose to earmark to candidates of their choice. The reply card indicated that checks were to be made payable to the NRSC. Contributions received were deposited into NRSC accounts and then disbursed to the candidates in the form of NRSC checks within 10 days of receipt. Again, the NRSC honored all earmarked designations regardless of whether the contributor chose the suggested candidates or one not suggested.

Majority '86 Program

The Majority '86 program consisted of two distinct forms of conduiting activity from November 1985 to November 1986. In one version, the NRSC mailed solicitation letters to individuals and political action committees requesting that they contribute $5,000 and thereby become Majority '86 members. The letters suggested that potential donors contribute $4,000 to named Senatorial candidates of the donor's choice and to contribute $1,000 to the NRSC. The solicitation letters emphasized that the choice of recipient candidates was at the sole discretion of the donor. Attached to the solicitation letter was a Majority '86 registration form suggesting four Republican Senatorial candidates by name and indicating that all four were particularly in need of financial support. Donors could check the box beside the name of each candidate they chose to support with any contribution of $1,000. No formula for allocating designations among multiple candidates was mentioned. Donors also were encouraged to make each check payable to each recipient candidate's campaign committee.

Under this version of the Majority '86 program, letters were also mailed to those "Inner Circle" members whose $1,000 renewal fee was due during the time the Majority '86 program

was in operation.[5/] Inner Circle members were given the opportunity to participate in the Majority '86 program by earmarking $4,000 to Senate candidates of their own choice. Again, the letters stressed that the choice of the recipient candidate was left to the sole discretion of the donors. Attached to the solicitation letters was a Majority '86 registration form which suggested three Republican Senatorial candidates by name who were in need of financial support and which encouraged donors to check the box beside the name of each candidate for whom a $1,000 check was enclosed. Donors were also asked to make the check payable to the candidate's campaign committee.

In a second version of the program, the NRSC telephoned individuals whose funds had been deposited in a segregated account and asked whether they would like to earmark their funds as contributions to one or more Republican Senatorial candidates identified by name. If the individual expressly earmarked his or her funds to a candidate chosen by the contributor, the NRSC issued a check and forwarded it to the designated campaign committee within ten days of original receipt of the contribution. For those individuals who chose not to designate their funds as contributions to particular candidates, the NRSC transferred their funds from the

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[5/] Individuals who contributed $1,000 or more to the NRSC were considered "Inner Circle" contributors.

Majority '86 account to an NRSC account, and reported it as a contribution to the NRSC. Funds were not held in the Majority '86 account for longer than 10 days.

Trust Program

The Trust Program coordinated earmarked contributions from November, 1985 to November, 1986 and consisted of two distinct formats. In one version, the NRSC mailed letters to "Trust members."[6] The letters asked the members to contribute to suggested Republican Senatorial candidates, identified by name, who were in priority races. The NRSC did not specify any amount of money to be contributed, the number of candidates to support, or any allocation formula if a donor chose to support more than one candidate.

In a second version of the Trust Program, Trust members were invited to designate a portion of their trust dues to suggested Senatorial candidates. The requests were made either by telephone or during regularly scheduled Trust briefing meetings. If a Trust member designated a portion of his or her donations to a candidate or candidates of his or her choice, the NRSC forwarded funds from his or her Trust account to the recipient campaign committee(s) in the form of an NRSC check. The NRSC mailed written verification notices

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[6] Individuals who contributed $10,000 or more to the NRSC were considered "Trust members."

to all Trust members who chose to designate their contributions and honored any and all choices of recipient candidates.

Miscellaneous Conduiting

From July 1986 to November 1986, the NRSC served as a conduit for many unsolicited earmarked contributions and solicited earmarked contributions. Many earmarked contributions were made payable to the recipient candidate committees while some were made payable to the NRSC with accompanying written instructions that funds be forwarded to particular candidates. The NRSC never established any specific written solicitation procedures for these programs. As with all the other fundraising programs included in this MUR, NRSC officials responsible for these activities have stated that they never coerced or manipulated earmarked contributions. The General Counsel's Brief does not dispute this conclusion.

* * * *

In sum, all NRSC efforts were carefully organized to do two things: (a) to insure that each individual's decision whether to earmark and choice of a recipient candidate were wholly voluntary and (b) to communicate to previous and potential Republican contributors the identity of Republican Senate campaigns that could benefit from voluntarily

earmarked contributions. At all times all donations, regardless of amount, were reported to the Commission by the NRSC, including the name, address, date and amount of each contribution.

Solicitation Costs

The NRSC entered into agreements with campaigns which received earmarked funds through the conduit programs of the Direct-To operation. See Sample Agreement at Exhibit 2 of Response to Complaint. The agreements provided that those campaigns would be billed on a monthly basis for their share of the costs reasonably associated with this program, including the services of NRSC telephone callers, correspondence with contributors, and NRSC overhead and other costs. Id.; See also Preztunik Affidavit at ¶ 11. In direct reliance on the opinions of two accounting firms, the NRSC billed each campaign committee a flat rate of $3 per earmarked contribution. See Preztunik Affidavit at ¶ 11. All bills for this service were presented to all participating Senate campaigns, including Congressman Santini's, and have been paid in full. Id.

ARGUMENT

II. BECAUSE THE APPELLATE PROCESS IN FEC v. NRSC MAY RENDER ALL ACTION IN MUR 2314 MOOT, THE COMMISSION SHOULD TEMPORARILY DEFER THESE PROCEEDINGS

The Commission is well aware of the proceedings in FEC v. NRSC and of the issues involved in that litigation. On June 4, 1991, the NRSC appealed the District Court's decision to the D.C. Circuit of the United States Court of Appeals, No. 91-5176. On appeal The Court of Appeals will be asked to resolve the definition of "direction or control" contained in 11 C.F.R. § 110.6(d) and to determine whether 11 C.F.R. § 110.6(d) is consistent with the Act and, as applied in MUR 2282, with the First Amendment of the United States Constitution.

The Court's resolution of those issues in favor of the NRSC could render moot the majority of the issues in MUR 2314. Further proceedings in MUR 2314 would require considerable Commission time and resources debating whether the NRSC's conduct met the "standard" for "direction or control" when the Court of Appeals may be simultaneously creating that standard. Under these circumstances, the interest of both the Commission and the NRSC weigh in favor of deferring action in MUR 2314 until FEC v. NRSC is concluded, at which time MUR 2314 will be ripe for resolution.

The Commission is granted broad discretion under the Administrative Procedure Act, 5 U.S.C. §§ 500 et seq. ("the APA") to postpone action where, as here, the circumstances dictate it would be prudent and efficient, as well as fair to the parties involved to do so. As provided in the APA:

> With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.

5 U.S.C. § 555(b) (emphasis added).

This provision has been liberally construed by the courts to afford agencies wide discretion over the timing of agency actions. See e.g., Public Citizen Health Research Group v. Commissioner, FDA, 724 F. Supp. 1013, 1019 (D.D.C. 1989) (an administrative agency has considerable discretion in establishing a timetable for conducting its proceedings and such discretion will be curtailed only where "the consequences of dilatoriness may be great.") (citations omitted). As the D.C. Circuit consistently has stated, an agency can defer action on a matter so long as delay is reasonable under the circumstances and not "excessive." Potomac Elec. Power Co. v. ICC, 702 F.2d 1026, 1034 (D.C. Cir. 1983); accord Public Citizen Health Research Group v. Commissioner, FDA, 740 F.2d 21, 32 (D.C. Cir. 1984). In fact, prompt proceedings are mandated primarily where excessive delay prejudices a party involved. See e.g.,

Public Citizens Health Research Group v. Commissioner, FDA, 724 F. Supp. at 1019 ("unreasonable delay may subject individuals to unnecessary dangers and even inflict harm on those in need of final action."); Public Citizen Health Research Group v. Commissioner, FDA, 740 F.2d at 35 (postponement should depend on "the nature and extent of the interests prejudiced by delay, the agency justification for the pace of decision, and the context of the statutory scheme out of which the dispute arises."); Panhandle Co-op Ass'n v. Environmental Protection Agency, 771 F.2d 1149 (8th Cir. 1985) (agency should not delay where the consequence is unfair prejudice to a party involved).

Here, postponement will result in fairness to the NRSC and efficiency of proceedings before the Commission without prejudice to any other party or interest. Thus, the Commission should exercise its statutory discretion to defer action until the Court of Appeals has ruled in FEC v. NRSC.

Finally, it seems odd that the General Counsel's Office and the Commission have only at this stage suddenly developed an insistence "to act expeditiously in the conduct of investigations" in this matter. Letter of General Counsel of July 16, 1991. The Complaint in this matter was filed on January 5, 1987, and the NRSC responded to that Complaint on March 10, 1987. Five months later, in August, 1987, the Commission voted to find Reason to Believe. The NRSC filed

its Response and Answers to Interrogatories in September 1987. Over a year and a half following this Response, on February 3, 1989, the Commission again found Reason to Believe. The NRSC responded to that finding on May 22, 1989 and proposed pre-probable cause conciliation. The Commission declined to conciliate and then the General Counsel's Office did not proceed to recommend probable cause until March 25, 1991, twenty-two months after the NRSC responded to the second Reason to Believe findings. Thus, since the Complaint was filed, General Counsel has taken forty-two months to act, while the NRSC has spent a total of eleven months responding to the Commission. It is therefore hard to understand General Counsel's unwillingness to wait for a reviewing court to delineate a definition of "direction or control."

III. BECAUSE THE NRSC DID NOT EXERCISE ANY DIRECTION OR CONTROL OVER THE CHOICE OF THE RECIPIENT CANDIDATES, NO VIOLATION OF THE ACT OR REGULATIONS HAS OCCURRED.

General Counsel admits (Brief at 15-16) that all contributions forwarded by the NRSC to the Jim Santini for Senate Committee through the five fundraising programs of the Direct-To operation were earmarked pursuant to 2 U.S.C. § 441a(a)(8) and 11 C.F.R. § 110.6. However, General Counsel asserts (Brief at 36-37) that the NRSC exercised "direction or control over the choice of the recipient candidate" under the provisions 11 C.F.R. § 110.6(d) and thus exceeded its

contribution limits to the Jim Santini for Senate Committee. 11 C.F.R. § 110.6(d)(2). As demonstrated more fully below, the NRSC did not exercise any "direction or control over the choice of the recipient candidate" in any of the five fundraising programs which are the subject of MUR 2314, to the extent that any standard for "direction and control" can be identified. Indeed, every precaution was taken to insure that each individual contributor retained complete direction and control over his or her contribution.

A. THE LAW

At the time of the NRSC conduit activities, the applicable FEC Regulations, under the heading "earmarked contributions," began by stating:

> (a) All contributions by a person made on behalf of or to a candidate, including contributions which are in any way earmarked or otherwise directed to the candidate through an intermediary or conduit, are contributions from the person to the candidate.
>
> (b) For purposes of this section, earmarked means a designation, instruction, or encumbrance (including those which are direct or indirect, expressed or implied, oral or written) which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee.

11 C.F.R. § 110.6 (1986) (emphasis added).[7/]

Having explicitly recognized that contributions may be "in any way" earmarked or "otherwise directed" to a candidate through an "oral" instruction to "an intermediary or conduit" and having defined "earmarking" as any "direct or indirect" "instruction" which "results in all or any part of the contribution . . . being made to . . . a clearly identified candidate," the Regulations go on to specify the requirements for such transactions and the way in which they must be reported. The applicable portions state that:

> The intermediary or conduit of the earmarked contribution shall report the original source and intended recipient of the contribution to the Commission . . . the Secretary of the Senate . . . and to the intended recipient.

Id. § 110.6(c).[8/] The Regulations further provide that:

> If the contribution passed through the conduit's account, disclose each contribution, regardless of amount, on schedules of itemized receipts and expenditures.

Id. 110.6(c)(1)(i) (emphasis added)[9/]; and

[7/] The language of 11 C.F.R. § 110.6(b) has been subsequently amended in 1989. 54 Fed. Reg. 34098, 34113 (1989).

[8/] The language of 11 C.F.R. § 110.6(c) has been subsequently amended in 1989. 54 Fed. Reg. 34098, 34113 (1989).

[9/] Recodified in 1989 at 11 C.F.R. § 110.6(c)(1)(v). 54 Fed. Reg. 34098, 34113 (1989).

> The intended recipient shall disclose on his next report each conduit through which the contribution passed.

Id. § 110.6(c)(ii)(3).

Thus, the applicable Regulations recognize and provide that contributions may be "passed through the conduit's account" (i.e., deposited, then withdrawn), and detail how such a transaction should be reported. In addition, the Regulations require an intermediary to transmit an earmarked contribution to the intended recipient within 10 days of the intermediary's receipt of the contribution. 11 C.F.R. 102.8(a) and (c).[10/]

Finally, the Regulations provide that:

> A conduit's or intermediary's contribution limits are not affected by passing on earmarked contributions except where the conduit exercises any direction or control over the choice of the recipient candidate.

Id. § 110.6(d)(1) (emphasis added).[11/]

[10/] The ten-day requirement in 11 C.F.R. § 102.8(a) and (c) has been subsequently incorporated into 11 C.F.R. § 110.6(b)(2)(iii). 54 Fed. Reg. 34098, 34113 (1989).

[11/] The language of 11 C.F.R. § 110.6(d)(1) has been subsequently amended in 1989. 54 Fed. Reg. 34098, 34113 (1989).

B. THE GENERAL COUNSEL'S BRIEF MISAPPLIES 11 C.F.R. § 110.6(d) AND ADVISORY OPINION 1975-10 WHICH HAS BEEN REJECTED IN FEC RULEMAKING PROCEEDINGS

As outlined in detail throughout the record in this Matter,[12/] the NRSC carefully organized an effective and responsive conduit program to contact individuals and to urge them to earmark their voluntary, statutorily-limited contributions to suggested candidates. As all evidence on the record indicates, the NRSC's programs were very successful at communicating to individuals where their support could most effectively be utilized and at forwarding contributions to Republican Senatorial candidates. Finally, the NRSC fully reported all earmarked contributions to the Federal Election Commission, as required by law. And therein lies General Counsel's fundamental criticism of the NRSC's activities -- that its encouragement of earmarked contributions was successful.

As stated (at 6) in the Brief:

> [11 C.F.R. § 110.6(d)] codified the legislative intent that political committees may not use intermediary or conduit status as a vehicle for widescale circumvention of the contribution limitations.

12/ See March 10, 1987 Response of NRSC at 3-10 and attached Exhibits; September 22, 1987 Answers To Interrogatories.

Thus, General Counsel's application of the provisions of 11 C.F.R. § 110.6(d) here reveals General Counsel's view that the NRSC's actual transgression was "widescale" and successful fundraising assistance to Republican candidates in 1986.

While the NRSC's program demonstrated widescale effectiveness in persuasive communication, its success is no reason to restrict it. As the Supreme Court noted in Buckley v. Valeo, 424 U.S. 1, 22 (1976), political parties serve the integral role of "effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." (emphasis added). Thus, successful programs, through which a political party enables individual contributors to contribute directly to candidates in need, are a fundamental goal of protected political activity, not a "circumvention" to be stamped out.

In labeling the NRSC's activity here as "widescale circumvention," the Brief focuses (at 17-18) on the NRSC's effective "solicitation method" which allegedly vested "direction or control over the choice of the recipient candidate" with the NRSC as compared to the "contributors' role [which] is much more passive."

General Counsel argues (Brief at 17-18):

> The solicitation method used by the NRSC to solicit earmarked contributions

> through the Direct-To operation is much the same as that used by the conduit in Advisory Opinion 1975-10. As noted above, in Advisory Opinion 1975-10, the Commission decided that the conduit would assert control over the earmarking of the contributions by actively seeking to obtain consent from the contributors to earmark their previously-made contributions for a specific candidate; therefore, the conduit should be regarded as having made the contribution along with the original contributor.

(emphasis added). General Counsel's argument is that the NRSC's active solicitation of earmarking necessarily constitutes "direction or control over the choice of the recipient candidate" for purposes of 11 C.F.R. § 110.6(d). Therein lies the flaw in General Counsel's linchpin reliance (Brief at 17-18) on Advisory Opinion 1975-10.[13/] Advisory Opinion 1975-10, a four-paragraph opinion, does not provide any definitive standards for construing the "direction or control over the choice of the recipient candidate" provision

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[13/] The Brief quotes (at 10) Advisory Opinion 1975-10 for the proposition that since

> the committee will be asserting some control over the earmarking by reason of the fact that it will actively seek to obtain consent from the donors to earmark funds for a specific Federal candidate, it follows that the committee, as well as the original donor, should be regarded as having made the contribution.

The General Counsel's conclusion (Brief at 17-18) that the NRSC's intermediary activities constitute "direction or control" merely paraphrases the language quoted from Advisory Opinion 1975-10.

of 11 C.F.R. § 110.6(d) because the Commission in 1975-10 was construing the applicability of 18 U.S.C. § 608(b)(6), the former earmarking statute in effect until it was repealed in 1976. Advisory Opinion 1975-10 is useless for construing 11 C.F.R. § 110.6(d) because in 1975 no regulatory scheme affecting the earmarking provision of 18 U.S.C. § 608(b)(6) even existed. Thus, there was no "direction or control" standard in existence to construe.[14/] Nor was there a prescribed ten-day time limit for an intermediary's transfer of earmarked contributions when Advisory Opinion 1975-10 was issued.[15/]

The factual circumstances construed by the Commission in Advisory Opinion 1975-10 are not clear on the face of that opinion. The requestor asked the Commission whether it could attempt to have "residual funds" in its account earmarked to individual candidates. Those are the only facts apparent in the Commission's opinion. Thus, the political committee in

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[14/] The "direction or control" regulation of 11 C.F.R. § 110.6(d) was not issued until 1976 and did not become effective until 1977. See 41 Fed. Reg. 35948, 35950 (1976); Explanation and Justification for 11 C.F.R. § 110.6, H.R. Doc. No. 95-44, 95th Cong., 1st Sess. 70 (1977). Thus it would appear that in Advisory Opinion 1975-10 the Commission considered the effect of active solicitation on the act of earmarking a contribution under 18 U.S.C. § 608(b)(6), not on the extent of the intermediary's "direction or control over the choice of the recipient candidate."

[15/] The requirement of 11 C.F.R. § 102.8(a) & (c) that a conduit transmit an earmarked contribution to the intended recipient within ten (10) days of its receipt became effective in 1980. See 45 Fed. Reg. 15080, 15106 (1980).

Advisory Opinion 1975-10 attempted to do what clearly would be forbidden under the current provisions of 11 C.F.R. § 102.8(a) & (c). The unearmarked, unencumbered "residual funds" at issue had evidently been in the committee's bank account for well over ten days.

Advisory Opinion 1975-10 serves as dubious support for the General Counsel's interpretation of the applicability of 11 C.F.R. § 110.6(d). The NRSC has already stated to the Commission that no funds were deposited in an account for more than 10 days prior to being earmarked and transferred to the Santini committee.[16/] See Preztunik Affidavit at ¶ 6. Thus, for the first ten days, the NRSC did not accept the funds pending an earmarking instruction. The NRSC held the funds in a separate, segregated escrow account. By contrast, Advisory opinion 1975-10 involved residual contributions held in the Committee's bank account for quite some time.

Moreover, General Counsel inappropriately attempts to transform the Commission's language in Advisory Opinion 1975-10 into a rule of "direction or control" notwithstanding the

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[16/] To the extent that the General Counsel finds "direction or control" from the ability to control the timing of contributions, see infra, at 38-39, it should be emphasized that the NRSC cannot determine when contributions will be sent to the NRSC beyond the mere timing of the mailing of its solicitation letters. That action does not establish direction or control. See AO 1980-46 and Matter Under Review (MUR) 1028. Moreover, once a contribution is made, the NRSC has no control over timing because, pursuant to 11 C.F.R. § 102.8(a), the earmarked contribution must be forwarded within 10 days.

Commission's decision in 1989 to reject an identical standard. 54 Fed. Reg. 34098, 34108 (1989). In Advisory Opinion 1975-10, the Commission stated that in the circumstances presented by the requestor, involving unencumbered "residual funds" of a committee, the committee's "actively seek[ing] to obtain consent from donors" would render earmarked contributions reportable by the committee. Yet in 1989, when amending 11 C.F.R. § 110.6(d), the Commission expressly declined to adopt active solicitation of earmarked contributions as an index of "direction or control over the choice of the recipient candidates":

> [A] commentor urged the Commission to revise § 110.6(d) to provide that the conduit exercises direction or control if the conduit actively solicits others to contribute and then turns the funds over to the candidate in such a way that the candidate is aware of the conduit's role.
>
> The Commission has carefully considered this comment as well as several different versions of possible regulatory language. In light of the wide variety of earmarking situations which have arisen in the past, the commission is not able at this time to formulate regulatory language that clearly delineates situations where direction or control exists from those in which the conduit does not exercise direction or control.

54 Fed. Reg. 34098, 34108 (1989).

One reason why the Commission may have rejected the codification of active solicitation as evidence of "direction or control" in 1989 is the absence of statutory support for

restricting a political committee's ability to inform its faithful of candidates in need and to suggest that contributors earmark their contributions -- whether before or after monies are mailed to the committee -- to those candidates. The lack of any statutory basis may indicate that Congress recognizes active solicitation of contributions as a right guaranteed by the First Amendment.[17] Had Congress intended to create a "direction or control" standard, then Congress could have included it in the language of the statute itself or Congress could have defined the term where it is mentioned in passing in the legislative history. Congress did neither. The General Counsel's Brief has attempted in vain to search for a needle of "direction or control" in the haystack of Advisory Opinion 1975-10 but has found only a thorn expressly rejected by the Commission in its amendments to 11 C.F.R. § 110.6(d) in 1989.

In conformity with the express provisions of 11 C.F.R. § 110.6(d), the NRSC conscientiously guaranteed that the "choice of the recipient candidate" was in the exclusive control of the contributor. The contributor, not the NRSC, chose whether to earmark his or her contribution to the suggested candidate. The NRSC's involvement was that of a

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[17] See Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

persuasive communicator and an effective organizer -- precisely what a political committee should be and well within the provisions of 11 C.F.R. § 110.6.

C. THE GENERAL COUNSEL'S BRIEF APPLIES INAPPROPRIATE AND IRRELEVANT INDICIA IN CONCLUDING THAT THE NRSC EXERCISED "DIRECTION OR CONTROL OVER THE CHOICE OF THE RECIPIENT CANDIDATE."

In attempting to devise some definition of "direction or control" in this Matter, the Brief gropes through the Commission's previous opinions in a vain search for an identifiable standard. This lack of success is not the result of a failure on General Counsel's research but rather demonstrates the failure of the Commission to breathe meaning into the standardless phrase "direction or control." The result is a laundry list (termed by General Counsel as a "totality of the circumstances") of irrelevant indicia inconsistently applied by General Counsel in a fruitless attempt to show a violation of this non-standard by Respondents.

In tediously combing previous Commission opinions for indicia of "direction or control" under 11 C.F.R. § 110.6(d), the Brief focuses on whether earmarked checks were written directly to the candidate committee or to the NRSC. Where, as here, all agree that the contributions were properly earmarked and that the conduit properly forwarded each earmarked contribution to the intended candidate, the

formalities of transmitting the money to the intended recipient indicate nothing about the contributor's choice of a recipient candidate.

Whether a concededly earmarked contribution was deposited in an intermediary's account appears to be irrelevant. Deposits into a conduit's account are expressly authorized by the Act (which speaks of indirect contributions) and by the Commission's own Regulations. 2 U.S.C. § 441a(a)(8) and 11 C.F.R. § 110.6(c). That a properly earmarked contribution flows through an intermediary's account indicates temporary custody of the earmarked contribution, which must be promptly disbursed to the chosen recipients under the provisions of 2 U.S.C. § 441a(a)(8) and 11 C.F.R. § 110.6. A check payable to the intermediary is evidence of nothing about the "choice of the recipient candidate" if the contributor commands that the proceeds go to the benefit of his or her chosen candidate. As stated in the General Counsel's Brief in MUR 1028 (at 4-5):

> In terms of direction, the Council does select the candidates for whom it will make mailings and does suggest to its supporters that contributions be made. It is important however, that this activity occurs prior to the time the supporters have made decisions to contribute to candidates. After a supporter has decided whether or not to act on the Council's suggestion, the Council cannot change the recipient or the amount. Thus the Council does not

> have any more influence over the decision to make a contribution than it would have if its mailings advised its supporters to send their contributions directly to the candidates. In that case, the fact the Council suggested the candidates to whom its supporters should make contributions would not result in the contributions being considered contributions by the Council.

(emphasis added).

Similarly irrelevant to a determination of "direction or control over the choice of the recipient candidate" is General Counsel's focus on the timing of soliciting earmarked contributions. General Counsel argues (Brief at 16) that because "[a]t any time during that [year-long] period, the NRSC could decide that it wanted a particular candidate to receive earmarked contributions," the NRSC necessarily controlled the "choice of the recipient candidate" for purposes of 11 C.F.R. § 110.6(d). That conclusion is a non sequitur.

Control over the timing of suggesting earmarked contributions is simply control over the timing of an appeal,[18/] not "control" over the choice of the intended

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[18/] Under the General Counsel's reasoning, an intermediary that solicits by telephone is at risk of exercising "direction or control" more than the intermediary that solicits by mail because the telephone apparently affords the intermediary more immediate access to the contributor. In addition to being a gross and unconstitutional restriction on freedom of speech, such a "test" is not suggested in any statute, regulation or opinion. See infra, at 43-44.

recipient. Moreover, "control" over the timing of earmarked contributions is inherent in any solicitation system. That is, any intermediary that advocates earmarked contributions controls when it solicits and can thereby influence the timing of earmarked contributions.

Furthermore, the Commission has expressly limited intermediaries' control over the timing of earmarking by requiring intermediaries to transmit earmarked contributions within ten days of receipt. 11 C.F.R. §§ 110.6(b)(2)(iii) and 102.8(a) & (c). As demonstrated in the record, the NRSC complied with this ten-day requirement by soliciting, receiving designations, and transmitting the earmarked contributions within ten days of receipt of the original contributions. Any earmarked contribution, within ten days, was transferred to an NRSC account and reported as a contribution to the NRSC. Thus, the Regulations expressly limit an intermediary's discretion to control the timing of each earmarking.

Another factor which the Brief confuses with "direction or control over the choice of the recipient candidate" is the distinction between pre- and post-receipt earmarking. Significantly, General Counsel cites only Advisory Opinion 1975-10 to support the assertion (Brief at 17) that because "contributors had earlier made contributions which were already in an NRSC account before the contributors had an

opportunity to decide whether to earmark their contributions," "[t]he contributors did not make the decision to contribute to a particular candidate, they merely consented to the NRSC's suggestion that they do so." (emphasis added).

General Counsel's false distinction between making a decision and merely consenting mimics the language of Advisory Opinion 1975-10 ("actively seek[ing] to obtain consent"), but fails to show how a post-receipt earmarking made after the check was written but before the check was accepted as a contribution by the NRSC vitiates the contributor's voluntary choice to designate to a recipient candidate. Advisory Opinion 1975-10 dealt with "residual funds" apparently still in the Committee's account long after the original contributions were made (and thus apparently long after the ten-day period currently required by FEC Regulations). As discussed supra, at 27-28, Advisory Opinion 1975-10 does not address the issue of "direction or control" and therefore is of no value in construing 11 C.F.R. § 110.6(d).

Here, the NRSC placed each check received into a separate, segregated account specifically reserved for funds which could be earmarked by individuals as contributions to Senate candidates within ten days of receipt by the NRSC. Under the Act, the NRSC then had ten days either to receive

an earmarking instruction from each contributor or to accept the contribution as a contribution to the NRSC. 2 U.S.C. § 432(b). If a contributor earmarked the contribution within the ten-day period, the NRSC forwarded the contribution to the recipient candidate. If, however, no earmarking instruction was received, the NRSC accepted the contribution and transferred it into its general account. Thus, the earmarking occurred before the NRSC accepted the contribution. Because the NRSC routinely honors all contributor instructions regarding donations, what General Counsel considers "illegal" is the NRSC's successful efforts to inform Republican donors that they have a right to contribute up to $1,000 to a Republican Senate campaign.

General Counsel also without statutory or administrative legal citation mistakenly points to methods of solicitation as evidence of "direction or control" by the NRSC and proposes a distinction between formal and informal contacts as a dividing line between conduit choice and contributor choice. For example, General Counsel asserts (Brief at 27):

> The fact that solicitations for the Majority '86 operation included telephone calls and personal contacts is sufficient to distinguish this matter from Advisory Opinion 1980-46 and MUR 1028. In those matters the solicitations were informal [sic] and impersonal, in the form of direct mail letters. But here, the solicitations included more personal contact with the contributors without any script. Thus, it cannot be determined what was said to the contributors . . . .

> Because of the seeming amount of personal and telephone contacts involved in the Majority '86 operation, the NRSC's involvement in the solicitation of earmarked contributions went beyond mere requests for assistance for certain campaigns or other general fundraising.

(emphasis added). Thus, for the first time in the history of 11 C.F.R. § 110.6(d), personal telephonic contact by a political party with party supporters is a new factor for determining whether an intermediary exercises "direction or control over the choice of the recipient candidate."

Furthermore, General Counsel stresses in analyzing the Direct-To Auto, Trust, and miscellaneous conduiting programs that contributor checks were made directly payable to the NRSC. In fact, as Respondents argue, infra, at 47-48, General Counsel's probable cause findings of NRSC "direction or control" over the Trust and miscellaneous programs are based solely on the contributor checks. Yet, in his analysis of the Majority '86 operation, General Counsel finds "direction or control" without mentioning the fact that in that fundraising program the NRSC urged contributors to make checks payable directly to the recipient candidates.

D. EACH OF THE NRSC'S CONDUIT PROGRAMS AT ISSUE HERE WAS CONSISTENT WITH PRIOR COMMISSION APPLICATIONS OF 11 C.F.R. § 110.6(d) IN WHICH NO "DIRECTION OR CONTROL OVER THE CHOICE OF THE RECIPIENT CANDIDATE" WAS FOUND.

In any event, each of the NRSC's conduit programs at issue here was consistent with previous Commission applications of 11 C.F.R. § 110.6(d) in which no "direction or control" was found. Each program was carefully designed to conform with the Commission's well-established rule stated in Advisory Opinion 1980-46:

> It appears that although the proposed mailing contains a clear suggestion that the individual receiving the communication make a contribution to a specific candidate through NCPAC as an intermediary, the individual contributor, not NCPAC, makes the choice whether to make a contribution to the specified candidate.

Fed. Elec. Fin. Guide (CCH) ¶ 5508 (1980) (emphasis added).

The fact that the NRSC suggested that contributors earmark their contributions to candidates simply cannot be considered evidence of "direction or control over the choice of the recipient candidate." In each of its conduit programs, the NRSC identified candidates in need of support. After the suggestion, however, the choice of designating a particular candidate, or of not designating any particular candidate, was wholly vested in the individual.

Indeed, the Commission has even permitted incorporated trade associations to solicit contributions on behalf of candidates selected by the trade association, which solicitations are sent to the trade association's own donor lists, and in the numbers selected by the trade association, without finding that the trade association exercised "direction or control over the choice of the recipient candidate." See Advisory Opinion 1987-29, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5912 (1988).

As long as an individual contributor voluntarily and knowingly chooses to earmark or not to earmark his or her contribution to a suggested candidate, the "choice of the recipient candidate" is necessarily that of the contributor, not that of the intermediary. Ultimately, voluntariness is the hallmark of contributor choice over the making of any contribution -- whether earmarked or otherwise. Yet the Brief attempts to minimize (at 7) this obvious index of "direction or control" by stating but not explaining:

> The language of 11 C.F.R. § 110.6(d)(1) contemplates that even where a contributor exercises a choice, the conduit or intermediary may exercise direction or control.

(emphasis added). General Counsel's argument, without analysis, that the Regulation "contemplates" but does not expressly provide a delineation between contributor choice and conduit control, is fatally flawed. General Counsel

attempts to impute a "contemplation" to the Regulations that is wholly unsupported by any statute, legislative history, or express provision in the Regulations themselves.

All facts on the record of MUR 2314 indicate that each of the programs at issue here preserved the contributors' voluntary choices of recipient candidates. General Counsel readily admits that all contributions at issue here were earmarked in compliance with 11 C.F.R. § 110.6. General Counsel does not assert that the NRSC diverted any earmarked contributions to candidates other than to those designated by the contributors. Nor do any facts on the record indicate that the NRSC failed to honor every earmarked contribution by properly forwarding each one to its intended candidate.

Moreover, the Brief's "totality of the circumstances" analysis ignores several aspects common to all five of the programs at issue in MUR 2314 which distinguish these programs from those fundraising operations in which the Commission or reviewing courts have found that the conduit exercised "direction or control." The Commission has found no "direction or control" where a conduit's "mailing contains a clear suggestion that the individual receiving the communication make a contribution to a specific candidate." Advisory Opinion 1980-46 Fed. Elec. Fin. Guide (CCH) ¶ 5508 (1980). The Commission has found no "direction or control" where one candidate is clearly identified, Id., and where

only two candidates are clearly identified. See the General Counsel's Brief, MUR 1028 at 2. Yet the Brief in this matter does not acknowledge that the NRSC informed contributors of a greater choice of candidates in several of the five programs at issue here than was provided in several fundraising operations for which the Commission, supra, found no conduit "direction or control." For example, the Direct-To program suggested at least three and often four candidates. In addition, Majority '86 mass-mailings mentioned four candidates. Finally, Trust program mass-mailings mentioned half-a-dozen or more candidates by name. While the record is not clear about precisely how many candidates were identified in each of the other programs, the suggestion of one candidate has been allowed by the Commission and thus should not evidence "direction or control" here.

Other indicia that have in the past led the Commission to find an absence of "direction or control over the choice of the recipient candidate" are similarly overlooked in the Brief. The NRSC complied fully with the ten-day requirement of 11 C.F.R. § 102.8(a) & (c). Contributors in the Direct-To Auto programs, one version of the Majority '86 program, the Trust Program, and the miscellaneous programs had full control over the amount of their contributions at the time of earmarking. And while the Brief (at 27-28) considers "telephone calls and personal contacts" to be indicative of

the NRSC's "direction or control" in one version of the Majority '86 program, General Counsel does not alternatively analyze the NRSC's use of direct-mail in the Direct-To Auto and another version of the Majority '86 programs as indicative of the absence of "direction or control."

Finally, General Counsel's findings of NRSC "direction or control" are internally inconsistent in several important respects. General Counsel makes clear in analyzing the Direct-To and Majority '86 programs (Brief at 16-17; 29) that the fact that contributor checks are made out to the intermediary cannot by itself establish conduit "direction or control." Yet, in discussing the miscellaneous conduiting programs, General Counsel bases his probable cause recommendation of "direction or control" solely on the fact that contributor checks were made payable to the NRSC. (Brief at 35).

Likewise, the General Counsel's recommendation that the NRSC exercised "direction or control" over the Trust Program is logically inconsistent with his analysis of other Direct-To fundraising operations. General Counsel notes (Brief at 30) that of all of the contributions received by Santini through the Trust Program, $107,875 were in the form of "contributor checks" (checks made directly payable to the Santini Committee) and $5,600 were in the form of NRSC checks. Then, General Counsel assumes, with no factual

support in the record, that the $5,600 in the form of NRSC checks "were already in the NRSC Trust Account" at the time of designation. Brief at 30. From this dubious and unsupported assumption, General Counsel finds probable cause of NRSC "direction or control." (Brief at 32).

Because General Counsel's presumption of what monies were already in the NRSC's coffers at the time of designation is based solely on the fact that certain monies were initially contributed to the NRSC in the form of checks made payable to the NRSC, General Counsel's probable cause finding of NRSC "direction or control" over the Trust Program is effectively based only on the fact that certain Trust contributions were in the form of NRSC checks. As Respondents point out, supra, at 42, such analysis is wholly inconsistent with General Counsel's treatment of the Direct-To and Majority '86 programs.

Clearly, General Counsel's "totality of the circumstances" analysis exhibits a selective bias toward stressing certain factors where they are present as "evidence" of "direction or control," and toward ignoring those same factors as "evidence" of the absence of any "direction or control."

In sum, the NRSC carefully preserved contributors' voluntary choices of the candidates to receive their earmarked contributions in each of the five programs at issue

here. In the Direct-To program, the NRSC preserved voluntary choice by suggesting at least three and often four candidates in need of support. The NRSC sent follow-up cards to contributors who chose to designate one or more of the suggested candidates (or any other candidate) to insure that the contributor chose the specific candidate(s) indicated on the card. The fact that 47% of contributors involved in the program did not earmark their contribution to any candidate shows that the NRSC respected the voluntariness of earmarking. See Preztunik Affidavit at ¶ 6. If a contributor could not be contacted or if a contributor refused to expressly earmark, the NRSC transferred the money to a general account. Furthermore, where a contributor chose a candidate other than the one suggested by the NRSC, the NRSC forwarded the contribution to the designated candidate. Thus, 32 out of a total of 34 Republican Senate candidates in 1986 received earmarked contributions through the NRSC's Direct-To program.

The NRSC preserved voluntary choice for contributors over the recipient candidate in the Direct-To Auto program, again, by sending a letter to supporters suggesting the name of a candidate in need and by asking the contributor to earmark his or her contribution to that candidate. The contributor evidenced his or her choice to designate to that

candidate by returning (or, in the alternative, by not returning) a contribution earmarked for that candidate.

The two Majority '86 solicitations also vested the ultimate decision to make a contribution to a specified candidate in the province of individual contributors. Whether the NRSC telephoned or wrote to Inner Circle members, the contributor chose whether or not to respond positively to the solicitations and to designate to the suggested candidates. The same is true for the Trust Programs and the miscellaneous conduiting programs.

In analyzing all of these programs, the Brief never questions the voluntariness of contributor choice over the solicitations or designations for recipient candidates. In sum, General Counsel has not and cannot point to any fact on the record in MUR 2314 which indicates that anyone but individual contributors made their own choices to designate their contributions to suggested candidates, or to chose not to designate, or to designate to non-suggested candidates. The NRSC's participation stopped at suggestion; suggestions have always been allowed under 11 C.F.R. § 110.6(d).

E. THE COMMISSION IS NOT BOUND TO FOLLOW THE RESULT IN FEC V. NRSC AND THE FACTS IN THAT CASE DIFFER FROM THE FACTS OF THIS MATTER.

The District Court's analysis and conclusion in FEC v. NRSC, which required the Commission's finding of probable

cause in MUR 2282, is not binding on the Commission in this separate Matter.

The Federal Election Commission has never considered itself to be generally bound by district court precedent unless the Commission chooses, for its own reasons, to follow such non-binding precedent. Even in instances where district court decisions holding provisions of the Act to be unconstitutional have been affirmed by the United States Supreme Court, the Commission has determined that it is not bound to follow such precedent. See, e.g., FEC v. Americans for Change 455 U.S. 129 (1982), affirming, 512 F. Supp. 489 (D.D.C. 1980). The Commission interpreted the Court's four-four affirmance of a three-judge panel district court in Americans for Change that held 26 U.S.C. § 9012(f) unconstitutional as leaving the issue "unresolved" and persisted in enforcing the statute. See FEC Advisory Opinion 1983-10, Fed. Election Camp. Fin. Guide (CCH) ¶ 5715 (1983). The FEC's disregard for the Court's decision forced the Supreme Court to revisit the same issue and expressly declare 26 U.S.C. § 9012(f) unconstitutional again in FEC v. NCPAC, 470 U.S. 480 (1984).

Even where the Supreme Court has had a majority for a proposition, the Commission has sought to avoid considering the Court's holding as binding on the grounds that it was not necessary to the Court's conclusion, and thus, only dicta.

For example, in FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986), all nine Justices of the Supreme Court assented to that portion of the opinion which states, "We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." Id. at 249. Nevertheless, the Commission has stated subsequently, "The Commission has not interpreted the Court's decision in [FEC v. Massachusetts Citizens for Life] as requiring the Commission in all circumstances to determine whether a given election message constitutes 'express advocacy' in applying § 441b . . . ." FEC Advisory Opinion 1989-28, Fed. Election Camp. Fin. Guide (CCH) ¶ 5978 (1990). The Commission's interpretation of this precedent is now on appeal. See Maine Right to Life Committee v. FEC, 928 F.2d 468, 470 (1st Cir. 1991), petition for cert. filed, No. 90-1923 (June 19, 1991).

Further, the facts of MUR 2282 on which Judge Gesell based his opinion in FEC v. NRSC differ substantially from the facts in this Matter. For example, General Counsel does not mention the fact that none of the five programs at issue here utilized a pre-contribution allocation formula. Here, every program at issue in MUR 2314 allowed the contributor independently to allocate the precise amount of his or her contribution to the candidate of his or her choice. Also, here each of the five programs at issue in this Matter

suggested specific candidates by name. By contrast, those factors were considered significant in FEC v. NRSC.

IV. THE NRSC COMPLIED WITH THE COMMISSION'S REGULATIONS IN CALCULATING AND REPORTING THE SOLICITATION COSTS ALLOCABLE TO THE RECIPIENT COMMITTEE BY A PER-CONTRIBUTION ACCOUNTING METHOD.

A. THE LAW

The Regulation concerning the reporting of allocable expenses in effect at the time the NRSC conducted the programs at issue in this MUR provided as follows:

> Expenditures, including independent expenditures, made on behalf of more than one candidate shall be attributed to each candidate in proportion to, and shall be reported to reflect, the benefit reasonably expected to be derived.

11 C.F.R. § 106.1(a) (1986) (emphasis added). Thus, the Regulation in effect at the time of the NRSC's activities at issue here required the NRSC to attribute and report its solicitation costs "in proportion to . . . the benefit reasonably expected to be derived" from those solicitations.[19/]

[19/] 11 C.F.R. § 106.1(a) was amended in 1990. 55 Fed. Reg. 26069 (1990).

B. THE NRSC'S PER-CONTRIBUTION ACCOUNTING METHOD WAS CALCULATED TO CHARGE THE RECIPIENT CAMPAIGN COMMITTEES "ACCORDING TO THE BENEFIT REASONABLY EXPECTED TO BE DERIVED" AND, THEREFORE, COMPLIED WITH 11 C.F.R. § 106.1(a).

1. 11 C.F.R. § 106.1(a), AS APPLICABLE TO THESE NRSC FUNDRAISING PROGRAMS, ONLY REQUIRES THAT THE INTERMEDIARY MAKE A BEFORE-THE-FACT ESTIMATE OF "THE BENEFIT REASONABLY EXPECTED TO BE DERIVED."

The Commission's Regulations in effect at the time the NRSC conducted the Direct-To operation in 1986 permitted the intermediary to exercise broad discretion in determining the formula by which each recipient candidate's share of the conduit's fundraising expenses was calculated. Rather than articulating an explicit method by which to calculate solicitation costs, the Regulations on their face only required, regardless of what method of allocation was used, that each recipient be billed a share of fundraising costs reflective of "the benefit reasonably expected to be derived." 11 C.F.R. § 106.1(a).

General Counsel's analysis of the solicitation costs issue appears to be based on the premise that the Regulations require that each recipient candidate's share of solicitation costs be allocated in direct proportion to the precise amount of financial benefit that the recipient ultimately receives from the conduit. Thus, General Counsel has entered the realm of accounting to construct and compare complex ratios

for each fundraising program between total funds solicited, total cost of solicitation, and total funds solicited or designated for Santini.

Yet, General Counsel's argument that each conduit must allocate precisely each recipient's share of solicitation costs after-the-fact is flawed for at least two reasons. First, the plain meaning of the regulation requires only that solicitation costs be allocated based on the benefit "reasonably expected to be derived" by each recipient.[20] 11 C.F.R. § 106.1(a) (emphasis added). The Regulation applicable to the Direct-To programs permitted conduits to make a reasonable before-the-fact estimate of the amount of money each recipient would ultimately receive through the conduiting operation, and to allocate each recipient's share of solicitation costs accordingly.[21] The plain language of the Regulation applicable to this matter makes no mention of allocating solicitation costs based on an after-the-fact determination of exactly how much each recipient ultimately

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[20] "Expect" is defined as "to look forward to the probable occurrence or appearance of." Webster's II New Riverside Univ. Dictionary 1984 (emphasis added).

[21] To the extent that certain fundraising programs are more successful than could be anticipated before-the-fact, the allocated costs may not correlate with the actual benefit received by a particular candidate, but the regulation in force in 1986 required allocation only according to the benefit "reasonably expected." See 11 C.F.R. § 106.1(a).

received through the conduit fundraising program.[22] The fact that the Commission found it necessary in 1990 to alter the Regulations to establish a new standard that cost-allocations must be based ex post facto on the amount of funds actually received by the recipient candidates clearly demonstrates that the Commission did not believe that the regulations applicable to the NRSC in 1985 and 1986 required such an after-the-fact accounting.

Second, prior Commission Advisory Opinions make clear that solicitation costs only need to be allocated based on an equitable, necessarily approximate, estimate of the benefits derived by the recipient candidates. For example, in Advisory Opinion 1978-67, the Commission interpreted 11 C.F.R. § 106.1 to permit a federal and state candidate to allocate certain expenses between them "in a manner that equitably reflects" the benefit to each campaign. FEC Advisory Opinion 1978-67, Fed. Election Camp. Fin. Guide (CCH) ¶ 5356 (1978).[23]

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[22] By contrast, see 11 C.F.R. 106.1(a) (1991) ("In the case of a fundraising program or event where funds are collected by one committee for more than one clearly identified candidate, the attribution shall be determined by the proportion of funds received by each candidate as compared to the total receipts by all candidates.") (emphasis added).

[23] See also Advisory Opinion 1980-38 and Advisory Opinion 1985-19 (citing Advisory Opinion 1978-67 approvingly).

Thus, it is disingenuous for General Counsel now, using the benefit of five years of hindsight, both as to the actual contributions received by the Santini committee and as to the evolution of the Commission's allocation regulations since then, to impose post hoc computations of solicitation costs allocable to Santini and to charge the NRSC with failing to compute the identical amounts before the first dime was contributed.

2. THERE IS NO EVIDENCE IN THE RECORD THAT THE NRSC FAILED TO BILL THE SANTINI COMMITTEE A SHARE OF SOLICITATION COSTS BASED ON THE "BENEFIT REASONABLY EXPECTED TO BE DERIVED" FROM THE DIRECT-TO OPERATION.

Based on the provisions of 11 C.F.R. § 106.1(a), the NRSC anticipated that certain expenses incurred in soliciting earmarked contributions through the Direct-To operation might constitute in-kind contributions to the recipient candidates. Each campaign committee contracted in advance to pay the NRSC the allocable portion of all costs reasonably associated with the fundraising programs. In light of the dictates of 11 C.F.R. § 106.1(a), the NRSC endeavored to make a before-the-fact estimate of the benefits each recipient candidate would derive from the Direct-To operation. Accordingly, before implementing Direct-To, the NRSC sought the independent opinions of two accounting firms to determine a formula that could reasonably allocate the benefit of

solicitation among participating campaign committees. In direct reliance on such independent, expert advice, the NRSC billed each campaign committee a flat fee of $3 for every successful solicitation or designated contribution that was forwarded to the campaigns through the "Direct-To" program. See Preztunik Affidavit at ¶ 11. The General Counsel presents no evidence on the record that the NRSC's reliance on the accounting firms' estimate of the allocable benefit of solicitation was unreasonable. Furthermore, the record demonstrates that the NRSC accurately applied the foregoing cost-allocation formula, fully billed the Santini Committee for its reasonable share of solicitation expenses, and that the Santini Committee timely paid all such bills.

As indicated in Section IV(B)(1), supra, however, the Regulations do not require a specific method of allocating solicitation costs; rather, any allocation method is permissible so long as the conduit bills each recipient a share of solicitation costs reasonably related to the benefits expected to be conferred. Because candidates were charged on a "per successful solicitation" basis, the General Counsel concludes (Brief at 38-39) that the $3 flat-fee covered only the costs associated with successful solicitations.

Yet, General Counsel, after an exhaustive investigation, presents absolutely no evidence either that the $3 flat fee

was designed by the NRSC to cover only the cost of successful solicitations or that the fee in fact failed to cover the cost of unsuccessful solicitations. All that is established on the record is that those candidates who received "benefit" from the conduit program shared the costs of the program, as determined by the outside accounting firms. Those who received no "benefit" from the conduit program would be allocated none of its operating costs. Revealingly, the same result would obtain under the General Counsel's method of allocating solicitation costs.

Finally, the NRSC utilized the $3 fee only upon the independent, expert advice of two accounting firms. Maryanne E. Preztunik, Comptroller of the NRSC during the period being examined, has stated that the $3 fee was designed to account for "the services of the telephone callers, the letters and verification forms mailed to contributors who directed a contribution to a candidate, and an allocated portion of the [NRSC] Committee's overhead and other costs."[24/] Unless General Counsel is questioning the credibility of Ms. Preztunik's affidavit, Ms. Preztunik must be taken at her word; the $3 flat fee included at least the bulk of the cost of unsuccessful as well as successful contributions, given

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[24/] Affidavit of Maryanne E. Preztunik, NRSC Comptroller and Director of Administration, ¶ 11, submitted as part of the NRSC March 10, 1987 Response to the Complaint filed in MUR 2314.

that total NRSC telephone and overhead costs for the conduit operation were included.

3. IN ANY EVENT, GENERAL COUNSEL ENGAGES IN SEVERAL HIGHLY QUESTIONABLE ACCOUNTING ASSUMPTIONS IN CONCLUDING THAT THE NRSC UNDER-BILLED THE SANTINI COMMITTEE FOR SOLICITATION COSTS IN THE "DIRECT-TO," "MAJORITY '86," AND "MISCELLANEOUS CONDUITING" PROGRAMS.

Even were the Commission to accept General Counsel's premise that each recipient's share of solicitation costs must be allocated ex post facto in direct proportion to the precise amount of financial benefit that the recipient ultimately received from the conduit, the Commission could not determine any defensible alternative estimates from the calculations and figures contained in the General Counsel's Brief.

As detailed below, each calculation is based in part on hypotheses and erroneous assumptions. Furthermore, none of the "guesstimates" take into account the fact that all solicitation expenses promoted the NRSC's own fundraising efforts and political programs and therefore, in substantial degree, constitute expenses allocable to the NRSC.

a. Direct-To

General Counsel states that the total cost of solicitation for the Direct-To program was $1,951,093 and that the total amount raised through the program was

$6,947,872. Brief at 40-41. From these figures, the General Counsel concludes that "the total solicitation cost" was approximately 28% of the total amount raised. Brief at 42. General Counsel then indicates that the Direct-To program resulted in the designation of $1,082,160 to particular candidates. Id. At this point in the analysis, General Counsel engages in an indefensible accounting assumption. Because General Counsel has gathered no evidence in the record of how much the NRSC spent in trying to obtain candidate designations, General Counsel attempts to arrive at the figure by comparing the ratio of the total amount of solicitation costs ($1,951,093) over the total amount raised ($6,947,872) with the ratio of the total amount of designation costs (unknown) over the total amount designated ($1,082,160). Id. The General Counsel's Brief thereby concludes that the NRSC spent $303,891 in trying to get candidate designations. Id.

Yet, the ratio comparisons yield an accurate estimation of total NRSC candidate-designation costs only if the ratio between total solicitation costs and amount solicited (28%) is the same as the ratio between total designation costs and the amount designated. There is absolutely no suggestion in the record, however, that the ratios are even remotely similar. In fact, to the extent that designation is a more efficient method of getting funds to candidates than

solicitation,[25] General Counsel's analysis undoubtedly overestimates the total amount spent by the NRSC on designation in the Direct-To program. As a result of this flawed premise, General Counsel's estimate of Santini's share of NRSC designation expenditures is equally flawed because that figure is arrived at by comparing the ratio between total designation costs (improperly estimated above at $303,891) over total amount designated ($1,082,162) with the ratio between Santini's share of designation costs (unknown) over the total amount designated to Santini ($71,627). Brief at 42-43.

b. Majority '86

Likewise, General Counsel utilizes questionable cost-allocation calculations with respect to Santini's share of NRSC Majority '86 expenses. The Brief states (at 45) that Santini received $75,575 from 90 contributors through the Majority '86 operation. It also observes that the NRSC raised $1,848,382 through the entire Majority '86 program and that $1,201,419, or 65% of the total amount raised, was designated for particular candidates. Brief at 46. After acknowledging that there is no evidence in the record of how

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[25] Persons who have recently donated money to the NRSC are much more likely to subsequently designate to particular candidates than persons who have not recently contributed to the NRSC are to donate to particular candidates.

much the NRSC spent on telephone and informal solicitations, General Counsel attempts to estimate Santini's share of the NRSC's mailing costs in implementing the Majority '86 Program. This estimate is made by assuming that because 65% of the entire amount raised in Majority '86 was designated for particular candidates, "at least 65% of the mailing cost can be attributed to those candidates," and therefore since the NRSC spent $269,211 on total mailing costs and Santini received 6.3% of the monies designated for particular candidates, Santini's share of Majority '86 mailing costs is 6.3%, or $16,935. Brief at 47.

The accuracy of the foregoing analysis can be questioned in at least three respects. First, General Counsel's analysis assumes that because 65% of the total amount raised by Majority '86 ended up being designated for particular candidates, likewise 65% of the total mailing costs associated with Majority '86 should be billed to the candidates' committees. Yet, the Brief also concedes that "Ten of the [sixteen Majority '86] mailings were general solicitations, seeking contributions to the NRSC for its operations. Six mailings were candidate specific and mentioned particular candidates involved in close races." Brief at 26. See also Answers to Interrogatory 5e. Thus, the greater portion of the Majority '86 solicitations did not even mention individual candidates, but the General counsel

attributes 65% of the mailing costs to designated contributions. This discrepancy points out the danger of such assumptions because one version of a mailing may be wildly successful while another is not. The General Counsel's mechanical formula fails to take account of these fundraising realities.

Second, if a disproportionate amount of the monies designated to particular candidates stemmed from telephone or other informal methods of suggestion, even the 37.5% figure (6/16) significantly overstates the degree to which candidate designations were the result of mailing costs. Finally, even if the General Counsel's figure did accurately represent the total mailing costs associated with candidate designations, because there is no evidence in the record of how many times Santini's name appeared in the letters the NRSC sent out, and because Santini's name may not have appeared as frequently as other candidate's names, the $16,935 figure may further overestimate Santini's share of NRSC Majority '86 mailing expenses.

c. Miscellaneous Conduiting

Finally, General Counsel utilizes more questionable cost-allocation calculations with respect to Santini's share of the miscellaneous conduiting operation costs. The General Counsel notes that Santini received $264,197.20 from the

miscellaneous program and that $235,901.66 was in the form of contributor checks and $28,295.54 was in the form of NRSC checks. Brief at 49. The Brief further notes that there is no evidence in the record of what proportion of the above contributions reached the NRSC in the form of unsolicited donations (and therefore could be passed on to the candidates by the NRSC at no charge), or what proportion of monies stemmed from NRSC solicitations. Brief at 50. Finally, the General Counsel cautions that there is no evidence in the record of what kind of solicitation activity the NRSC utilized in raising funds for the miscellaneous program. Id.

Despite all the foregoing evidentiary holes, General Counsel nevertheless concludes that the NRSC under-charged the Santini committee for monies forwarded through the miscellaneous program by assuming that the ratio between solicitation costs and total solicitations obtained through this fundraising operation was the same as it was in the other Direct-To programs (i.e., between 22% and 28%). Brief at 51. In addition to the earlier incorrect premises that led to the determination of these percentages, the General Counsel's conclusion is problematic in at least two other respects. First, given that a large amount of the soliciting conducted by the NRSC in the miscellaneous program was informal in nature, and given that informal methods of solicitation are generally less expensive than formal

methods, General Counsel almost certainly overstates the amount of money the NRSC spent on these solicitations. Second, General Counsel has absolutely no basis for and makes no effort to determine the amount of unsolicited contributions that were received by the NRSC in the miscellaneous program although it concedes that a number of the contributions in this category were unsolicited. Brief at 34. For each unsolicited contribution the Santini campaign received through the NRSC, General Counsel has greatly overstated the amount of money the NRSC spent in forwarding Santini earmarked contributions through this program.

CONCLUSION

For the reasons stated above, Respondents respectfully request that the Commission defer any action in MUR 2314 until resolution of the appeal pending in FEC v. NRSC. Alternatively, should the Commission proceed, Respondents respectfully request that the Commission find no probable cause to believe.

Respectfully submitted,

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